Chapter V
INFORMATION PRIVACY LAWS

While Cho was a student at Virginia Tech, his professors, fellow students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center all had dealings with him that raised questions about his mental stability. There is no evidence that Cho's parents were ever told of these contacts, and they say they were unaware of his problems at school. Most significantly, there is no evidence that Cho's parents, his suitemates, and their parents were ever informed that he had been temporarily detained, put through a commitment hearing for involuntary admission, and found to be a danger to himself. Efforts to share this information was impeded by laws about privacy of information, according to several university officials and the campus police. Indeed, the university's attorney, during one of the panel's open hearings and in private meetings, told the panel that the university could not share this information due to privacy laws.

The panel's review of information privacy laws governing mental health, law enforcement, and educational records and information revealed widespread lack of understanding, conflicting practice, and laws that were poorly designed to accomplish their goals. Information privacy laws are intended to strike a balance between protecting privacy and allowing information sharing that is necessary or desirable. Because of this difficult balance, the laws are often complex and hard to understand.

The widespread perception is that information privacy laws make it difficult to respond effectively to troubled students. This perception is only partly correct. Privacy laws can block some attempts to share information, but even more often may cause holders of such information to default to the nondisclosure option—even when laws permit the option to disclose. Sometimes this is done out of ignorance of the law, and sometimes intentionally because it serves the purposes of the individual or organization to hide behind the privacy law. A narrow interpretation of the law is the least risky course, notwithstanding the harm that may be done to others if information is not shared.

Much of the frustration about privacy laws stems from lack of understanding. When seen clearly, the privacy laws contain many provisions that allow for information sharing where necessary. Also, FERPA and HIPAA are not consistent (Cook Counseling Center records come under FERPA, Carilion's under HIPAA), which causes difficulties, as explained below.

This chapter addresses federal and state law concerning four key categories of information that may be useful in evaluating and responding to a troubled student:

Law enforcement records
Court records
Medical information and records
Educational records.

The report also examines a Virginia law that regulates the process of disclosing information. These laws are discussed in the context of Cho's conduct leading to the shootings of April 16.

Appendix G summarizes the privacy laws as background for this chapter, for those unfamiliar with them.

LAW ENFORCEMENT RECORDS

Law enforcement agencies must disclose certain information to anyone who requests it.[1] They must disclose basic information about felony crimes: the date, location, general description of the crime, and name of the investigating officer. Law enforcement agencies also have to release the name and

[1] Va. Code § 2.2-3706

address of anyone arrested and charged with any type of crime. All records about noncriminal incidents are available upon request. When they disclose noncriminal incident records, law enforcement agencies must withhold personally-identifying information, such as names, addresses, and social security numbers.[2]

Universities with campus police departments have additional responsibilities. They are required to maintain a publicly available log that lists all crimes.[3] The log must give the time, date, and location of each offense, as well as the disposition of each case. Under Virginia law, campus police departments must also ensure that basic information about crimes is open to the public.[4] This includes the name and address of those arrested for felony crimes against people or property and misdemeanor crimes involving assault, battery, or moral turpitude.[5]

Most of the detailed information about criminal activity is contained in law enforcement investigative files. Under Virginia's Freedom of Information Act, law enforcement agencies are *allowed* to keep these records confidential. The law also gives agencies the discretion to release the records.[6] However, law enforcement agencies across the state typically have a policy against disclosing such records.

JUDICIAL RECORDS

As a general matter, court records are public and can be widely disclosed. For the purposes of responding to troubled students, two types of court proceedings do not fit the general rule: juvenile hearings and commitment hearings for involuntary admission.[7]

A commitment hearing for involuntary admission is a hearing where a judicial officer makes a determination as to whether an individual will be committed to a mental health facility involuntarily. Records of these hearings, which consist of any medical records, reports of evaluations, and all court documents, must be sealed when the subject of the hearing requests it. Tape recordings are made of the proceedings. The tapes are sealed and held by court clerks. These records can only be released by court order.[8]

Although their records are confidential, the hearings themselves must be open to the public and certain information about the hearing is, at least in theory, publicly available.[9] This would include the name of the subject and the time, date, and location of the hearing. Of course, there is no central location where this information is stored so, as a practical matter, unless an interested party knew where the hearing was being held or who was presiding over it, that person would have a difficult time uncovering such information. For example, Cho's commitment hearing occurred approximately 12 hours after he was detained. Logistical difficulties also make it difficult to visit psychiatric facilities, which are common locations for commitment hearings. The key, though, is that the information is public. In Cho's case, the Virginia Tech Police Department (VTPD) was aware that he had been detained pending a commitment hearing. VTPD could have shared this information with

[2] Law enforcement records regarding juveniles (persons under 18) have special restrictions regarding disclosure. Normally, they can only be released to other parts of the juvenile justice system or to parents of an underaged suspect. However, Virginia law also authorizes, but does not require, law enforcement to share information with school principals about offenders who commit a serious felony, arson, or weapons offense. Police can tell principals when they believe a juvenile is a suspect or when a juvenile is charged with an offense. After the case is finished, law enforcement officials can tell principals the outcome. Va. Code § 16.1-301

[3] 20 U.S.C. § 1092(f)(4)(A)

[4] Va. Code § 23-232.2(B)

[5] Va. Code § 23-232.2(B)

[6] Va. Code § 2.2-3706

[7] Va. Code § 17.1-208 (circuit court records open to the public). Regarding juvenile court records: under Virginia law, juvenile court records are even more tightly restricted than juvenile law enforcement records. Court records can only be used within the juvenile justice system unless a judge orders the records released. Va. Code § 16.1-305

[8] Va. Code § 37.2-818. Cho was the subject of a commitment hearing for involuntary admission on December 14, 2005. The panel obtained the tape recording and records of this hearing through court order.

[9] Va. Code § 37.2-820

university administration or Cho's parents, though they did not.

MEDICAL INFORMATION

Both state and federal law govern privacy of medical information. The federal Health Insurance and Portability and Accountability Act of 1996 and regulations by the Secretary of Health and Human Services establish the federal standards. Together, the law and regulations are commonly known as "HIPAA." Virginia law on medical information privacy is found in the Virginia Health Records Privacy Act (VHRPA).

HIPAA and Virginia law have similar standards. They both state that health information is private and can only be disclosed for certain reasons. When specific provisions conflict, HIPAA can preempt a state law, making the state law ineffective. Generally, this occurs when a state law attempts to be less protective of privacy than the federal law or rules.

Both laws apply to all medical providers and billing entities. They define "provider" broadly to include doctors, nurses, therapists, counselors, social workers, and health organizations such as HMOs and insurance companies, among others.

Three basic types of disclosures are permitted under these medical information privacy laws:

- Requests made or approved by the person who is the subject of the records. These exceptions are based on the idea that the privacy laws are for the benefit of the person being treated. If the patient asks for his or her records from a health care provider or provides written authorization, the provider must release them.
- Disclosure when information must be shared in order to make medical treatment effective. Medical privacy laws allow providers to share information with each other when necessary for treatment purposes.[10] If a medical provider needs to disclose information to a family member, the provider can do so in two ways. The provider can gain permission from the patient. Or, in an emergency where the patient is unable to make such a decision, the provider can proceed without explicit permission.[11]
- Situations where privacy is outweighed by certain other interests. For example, providers may sometimes disclose information about a person who presents an imminent threat to the health and safety of individuals and the public.[12] Providers can also disclose information to law enforcement in order to locate a fugitive or suspect.[13] Providers also are authorized to disclose information when state law requires it.[14]

Disclosure of information is required by state law in some situations and is permissible by HIPAA. An example under Virginia state law is that Virginia health care providers must report evidence of child abuse or neglect. Another type of required disclosure is when freedom of information laws require public agencies to disclose their records. If a freedom of information law requires a public hospital to disclose information, the disclosure is authorized under HIPAA.[15]

EDUCATIONAL RECORDS

Privacy of educational records is primarily governed by federal law, The Family Educational Rights and Privacy Act of 1974 and regulations issued by the Secretary of

[10] 45 C.F.R. § 164.506(c)(2); Va. Code § 32.1-127.1:03(D)(7)

[11] 45 C.F.R. § 164.510(b)

[12] 45 C.F.R. § 164.512(j)

[13] Va. Code § 32.1-127.1:03(D)(28)

[14] 45 C.F.R. § 164.512(a), (c)

[15] If, however, a state law merely *permits* disclosure, HIPAA usually will override state law and prevent disclosure. For example, Virginia's Freedom of Information Act gives public agencies the discretion to release information, but does not require information to be released. Because the decision is left to the discretion of the agency, HIPAA would prohibit disclosure.

Education that interpret the law. This law and the regulations are commonly known as "FERPA."

FERPA applies to all educational institutions that accept federal funding. As a practical matter, this means almost all institutions of higher learning, including Virginia Tech. It also includes public elementary and secondary schools. Like HIPAA, FERPA's basic rule favors privacy. Information from educational records cannot be shared unless authorized by law or with consent of a parent, or if the student is enrolled in college or is 18 or older, with that student's consent.

FERPA has special interactions for medical and law enforcement records. HIPAA also makes an exception for all records covered by FERPA. [16] Therefore, records maintained by campus health clinics are not covered by HIPAA.[17] Instead, FERPA and state law restrictions apply to these records.[18] FERPA provides the basic requirements for disclosure of health care records at campus health clinics, and state law cannot require disclosure that is not authorized by FERPA.[19] However, if FERPA authorizes disclosure, a campus health clinic would then have to look to state law to determine whether it could disclose records, including state laws on confidentiality of medical records.

For example, Virginia Tech's Cook Counseling Center holds records regarding Cho's mental health treatment. On a request for those records, the center must determine whether the disclosure is authorized under both FERPA and the Virginia Health Records Privacy Act. It is important to note that FERPA was drafted to apply to educational records, not medical records. Though it has a small number of provisions about medical records, FERPA does not enumerate the different types of disclosures authorized by HIPAA.

FERPA also has a different scope than HIPAA. Medical privacy laws such as HIPAA apply to all information—written or oral—gained in the course of treatment. FERPA applies only to information in student *records*. Personal observations and conversations with a student fall outside FERPA. Thus, for example, teachers or administrators who witness students acting strangely are not restricted by FERPA from telling anyone—school officials, law enforcement, parents, or any other person or organization.[20] In this case, several of Cho's professors and the Residence Life staff observed conduct by him that raised their concern. They would have been authorized to call Cho's parents to report the behavior they witnessed.

Many records kept by university law enforcement agencies also fall outside of FERPA. For example, it does not apply to records created and maintained by campus law enforcement for law enforcement purposes.[21] If campus law enforcement officers share a record with the school, however, the copy that is shared becomes subject to FERPA. For example, in fall 2005, VTPD received complaints from female students about Cho's behavior. Their records of investigation were created for the law enforcement purpose of investigating a potential crime. Accordingly, the police could have told Cho's parents of the incident. When the university's Office of Judicial Affairs requested the records, FERPA rules applied to the copies held in that office but not to any record retained by the VTPD.

[16] 45 C.F.R. § 160.103, definition of "protected health information."

[17] U.S. Department of Education, FERPA General Guidance for Parents, available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/parents.html (attached as Appendix H) ("June 2007 ED Guidance").

[18] The nature of FERPA's application to treatment records has not been uniformly interpreted (discussed in the "Recommendations" section). The analysis in this section is based in part on an official letter sent to the University of New Mexico by the Family Policy Compliance Office (FPCO). The FPCO is the part of the Department of Education that officially interprets FERPA. The letter is included in Appendix G.

[19] Letter from LeRoy S. Rooker, Director, Family Compliance Policy Office, U.S. Department of Education, to Melanie P. Baise, Associate University Counsel, The University of New Mexico, dated November 29, 2004 (enclosed as Appendix G).

[20] June 2007 ED Guidance (Appendix H).

[21] 20 U.S.C. § 1232g(a)(4)(B)(ii)

Law enforcement performs various other functions that promote public order and safety. For example, law enforcement officers are usually responsible for transporting people who are under temporary detention orders to mental health facilities. No privacy laws apply to this law enforcement function. In the Cho case, the VTPD was not prohibited from contacting the university administration or Cho's parents to inform them that Cho was under a temporary detention order and had been transported to Carilion St. Albans Behavioral Health.

FERPA authorizes release of information to parents of students in several situations. First, it authorizes disclosure of any record to parents who claim adult students as dependents for tax purposes.[22] FERPA also authorizes release to parents when the student has violated alcohol or drug laws and is under 21.[23]

FERPA generally authorizes the release of information to school officials who have been determined to have a legitimate educational interest in receiving the information.[24] FERPA also authorizes unlimited disclosure of the final result of a disciplinary proceeding that concludes a student violated university rules for an incident involving a crime of violence (as defined under federal law) or a sex offense.[25] Finally, some FERPA exceptions regarding juveniles are governed by state law.[26]

FERPA also contains an emergency exception. Disclosure of information in educational records is authorized to any appropriate person in connection with an emergency "if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[27] Although this exception does authorize sharing to a potentially broad group of parties, the regulations specifically state that it is to be narrowly construed. HIPAA, too, contains exceptions that allow disclosure in emergency situations.[28] For both laws, the exceptions have been construed to be limited to circumstances involving imminent, specific threats to health or safety. Troubled students may present such an emergency if their behavior indicates they are a threat to themselves or others. The Department of Education's Family Compliance Policy Office (FCPO) has advised that when a student makes suicidal comments, engages in unsafe conduct such as playing with knives or lighters, or makes threats against another student, the student's conduct can amount to an emergency (see letter in Appendix G).[29] However, the boundaries of the emergency exceptions have not been defined by privacy laws or cases, and these provisions may discourage disclosure in all but the most obvious cases.

GOVERNMENT DATA COLLECTION AND DISSEMINATION PRACTICES ACT

One other law on information disclosure applies to most Virginia government agencies. The Government Data Collection and Dissemination Practices Act establishes rules for collection, maintenance, and dissemination of individually-identifying data. The act does not apply to police departments or courts. Agencies that are bound by the act can only disclose information when permitted or required by law.[30] The attorney general of Virginia has interpreted "permitted by law" to include any official request made by a government agency for a lawful function of the agency. An agency must inform people who

[22] 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8)

[23] 20 U.S.C. § 1232g(i)

[24] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1)

[25] 20 U.S.C. § 1232g(b)(6)(B)

[26] 20 U.S.C. § 1232g(b)(1)(E); Va. Code § 22.1-287. Virginia law authorizes disclosure to law enforcement officers seeking information in the course of his or her duties, court services units, mental health and medical health agencies, and state or local children and family service agencies.

[27] 20 U.S.C. § 1232g(b)(1)(I)

[28] 45 C.F.R. § 164.512(j); Va. Code § 32.1-127.1:03(D)(19); § 32.1-127.1:04; 20 U.S.C. § 1232g(b)(1)(I)

[29] Letter from LeRoy S. Rooker, Director, Family Compliance Policy Office, U.S. Department of Education, to Superintendent, New Bremen Local Schools, dated September 24, 1994 (enclosed as Appendix G).

[30] Va. Code § 2.2-3803(A)(1)

give it personal information how it will ordinarily use and share that information. An agency can disclose personal information outside of these ordinary uses. When it does, however, it must give notice to the people who provided the information.[31] This act was initially used as a reason for not providing information to the panel until its authenticity was strengthened by the governor's executive order.

KEY FINDINGS

Organizations and individuals must be able to intervene in order to assist a troubled student or protect the safety of other students. Information privacy laws that block information sharing may make intervention ineffective.

At the same time, care must be taken not to invade a student's privacy unless necessary. This means there are two goals for information privacy laws: they must allow enough information sharing to support effective intervention, and they must also maintain privacy whenever possible.

Effective intervention often requires participation of parents or other relatives, school officials, medical and mental health professionals, court systems, and law enforcement. The problems presented by a seriously troubled student often require a group effort. The current state of information privacy law and practice is inadequate to accomplish this task. The first major problem is the lack of understanding about the law. The next problem is inconsistent use of discretion under the laws. Information privacy laws cannot help students if the law allows sharing but agency policy or practice forbids necessary sharing. The privacy laws need amendment and clarification. The panel proposes the following recommendations to address immediate problems and chart a course for an effective information privacy system.

RECOMMENDATIONS

V-1 Accurate guidance should be developed by the attorney general of Virginia regarding the application of information privacy laws to the behavior of troubled students. The lack of understanding of the laws is probably the most significant problem about information privacy. Accurate guidance from the state attorney general's office can alleviate this problem. It may also help clarify which differences in practices among schools are based on a lack of understanding and which are based on institutional policy. For example, a representative of Virginia Tech told the panel that FERPA prohibits the university's administrators from sharing disciplinary records with the campus police department. The panel also learned that the University of Virginia has a policy of sharing such records because it classifies its chief of police as an official with an educational interest in such records.

The development of accurate guidance that signifies that law enforcement officials may have an educational interest in disciplinary records could help eliminate discrepancies in the application of the law between two state institutions. The guidance should clearly explain what information can be shared by concerned organizations and individuals about troubled students. The guidance should be prepared and widely distributed as quickly as possible and written in plain English. Appendix G provides a copy of guidance issued by the Department of Education in June 2007, which can serve as a model or starting point for the development of clear, accurate guidance.

V-2 Privacy laws should be revised to include "safe harbor" provisions. The provisions should insulate a person or organization from liability (or loss of funding) for making a disclosure with a good faith belief that the disclosure was necessary to protect the health, safety, or welfare of the person involved or members of the general public. Laws protecting good-faith disclosure for health, safety, and welfare can help combat any bias toward nondisclosure.

[31] Va. Code § 2.2-3806(A)(2)

V-3 The following amendments to FERPA should be considered:

FERPA should explicitly explain how it applies to medical records held for treatment purposes. Although the Department of Education interprets FERPA as applying to all such records,[32] that interpretation has not been universally accepted. Also, FERPA does not address the differences between medical records and ordinary educational records such as grade transcripts. It is not clear whether FERPA preempts state law regarding medical records and confidentiality of medical information or merely adds another requirement on top of these records.

FERPA should make explicit an exception regarding treatment records. Disclosure of treatment records from university clinics should be available to any health care provider without the student's consent when the records are needed for medical treatment, as they would be if covered under HIPAA. As currently drafted, it is not clear whether off-campus providers may access the records or whether students must consent. Without clarification, medical providers treating the same student may not have access to health information. For example, Cho had been triaged twice by Cook Counseling Center before being seen by a provider at Carilion St. Albans in connection with his commitment hearing. Later that day, he was again triaged by Cook. Carilion St. Albans's records were governed by HIPAA. Under HIPAA's treatment exception, Carilion St. Albans was authorized to share records with Cook. Cook's records were governed by FERPA. Because FERPA's rules regarding sharing records for treatment are unclear about outside entities or whether consent is necessary, Carilion St. Albans could not be assured that Cook would share its records. This situation makes little sense.

V-4 The Department of Education should allow more flexibility in FERPA'a "emergency" exception. As currently drafted, FERPA contains an exception that allows for release of records in an emergency, when disclosure is necessary to protect the health or safety of either the student or other people. At first, this appears to be an exception well-suited to sharing information about seriously troubled students. However, FERPA regulations also state that this exception is to be strictly construed. The "strict construction" requirement is unnecessary and unhelpful. The existing limitations require that an emergency exists and that disclosure is necessary for health or safety. Further narrowing of the definition does not help clarify when an emergency exists. It merely feeds the perception that nondisclosure is always a safer choice.

V-5 Schools should ensure that law enforcement and medical staff (and others as necessary) are designated as school officials with an educational interest in school records. This FERPA-related change does not require amendment to law or regulation. Education requires effective intervention in the lives of troubled students. Intervention ensures that schools remain safe and students healthy. University policy should recognize that law enforcement, medical providers, and others who assist troubled students have an educational interest in sharing records. When confirmed by policy, FERPA should not present a barrier to these entities sharing information with each other.

V-6 The Commonwealth of Virginia Commission on Mental Health Reform should study whether the result of a commitment hearing (whether the subject was voluntarily committed, involuntarily committed, committed to outpatient therapy, or released) should also be publicly available despite an individual's request for confidentiality. Although this information would be helpful in tracking people going though the system, it may infringe too much on their privacy.

As discussed in Chapter IV, and its recommendations to revise Virginia law regarding the commitment process, the law governing hearings should explicitly state that basic

[32] June 2007 ED Guidance (Appendix H).

information regarding a commitment hearing (the time, date, and location of the hearing and the name of the subject) is publicly available even when a person requests that records remain confidential. This information is necessary to protect the public's ability to attend commitment hearings.

V-7 The national higher education associations should develop best practice protocols and associated training for information sharing. Among the associations that should provide guidance to the member institutions are:

- American Council on Education (ACE)
- American Association of State Colleges and Universities (AASCU)
- American Association of Community Colleges (AACE)
- National Association of State and Land Grant Universities and Colleges (NASLGUC)
- National Association of Independent Colleges and Universities (NAICU)
- Association of American Universities (AAU)
- Association of Jesuit Colleges and Universities

If the changes recommended above are implemented, it is possible that no further changes to privacy laws would be necessary, but guidance on their interpretation will be needed. The unknown variable is how entities will choose to exercise their discretion when the law gives them a choice on whether to share or withhold information. How an institution uses its discretion can be critically important to whether it is effectively able to intervene in the life of a troubled student. For example, FERPA currently allows schools to release information in their records to parents who claim students as dependents. Schools are not, however, required to release that information. Yet, if a university adopts a policy against release to parents, it cuts off a vital source of information. The history of Seung Hui Cho shows the potential danger of such an approach. During his formative years, Cho's parents worked with Fairfax County school officials, counselors, and outside mental health professionals to respond to episodes of unusual behavior. Cho's parents told the panel that had they been aware of his behavioral problems and the concerns of Virginia Tech police and educators about these problems, they would again have become involved in seeking treatment. The people treating and evaluating Cho would likely have learned something (but not all) of his prior mental health history and would have obtained a great deal of information germane to their evaluation and treatment of him. There is no evidence that officials at Virginia Tech consciously decided not to inform Cho's parents of his behavior; regardless of intent, however, they did not do so. The example demonstrates why it may be unwise for an institution to adopt a policy barring release of information to parents.

The shootings of April 16, 2007, have forced all concerned organizations and individuals to reevaluate the best approach for handling troubled students. Some educational institutions in Virginia have taken the opportunity to examine the difficult choices involved in attempts to share necessary information while still protecting privacy. Effort should be made to identify the best practices used by these schools and to ensure that these best practices are widely taught. All organizations and individuals should be urged to employ their discretion in appropriate ways, consistent with the best practices. Armed with accurate guidance, amended laws, and a new sense of direction, it is an ideal time to establish best practices for intervening in the life of troubled students.